

CONTRACT #8
RFS # N/A

Tennessee Board of Regents
Tennessee State University

VENDOR:
Fairborn Observatory



Tennessee Board of Regents

1415 Murfreesboro Road - Suite 350 - Nashville, Tennessee 37217-2833
(615) 366-4400 FAX (615) 366-4464

December 8, 2008

RECEIVED

DEC 10 2008

FISCAL REVIEW

Ms. Leni S. Chick
Fiscal Analyst
Rachel Jackson Building, 8th Floor
Nashville, TN 37243

Dear Ms. Chick:

Enclosed please find an Agreement between Tennessee State University and Fairborn Observatory providing for the continued operation of TSU's state-of-the-art automated observatory which provides the primary research data for TSU's astronomers and students. Please note that the term of this contract begins January 1, 2009.

Per Fiscal Review's request to see non-competitive agreements/amendments, this contract must be approved by the Committee. **Please contact me regarding the date this will go before the Fiscal Review Committee and I will inform the representatives to insure they are present for the meeting in which the contract will be discussed.** If you have any questions, please do not hesitate to contact me at 366-4436.

Information regarding the contract may be sent to my attention at the Tennessee Board of Regents, 1415 Murfreesboro Road, Suite 350, Nashville, Tennessee 37217.

Sincerely,

Angela A. Gregory
Director of Purchasing and Contracts

cc: Charles Manning
Bob Adams
Cynthia Brooks, TSU

Austin Peay State University • East Tennessee State University • Middle Tennessee State University • Tennessee State University
Tennessee Tech University • University of Memphis • Chattanooga State Technical Community College
Cleveland State Community College • Columbia State Community College • Dyersburg State Community College
Jackson State Community College • Motlow State Community College • Mississippi State Technical Community College
Roane State Community College • Southwest Tennessee Community College • Volunteer State Community College
Walters State Community College • Nashville State Technical Community College • Northeast State Technical Community College
The Tennessee Technology Centers



OFFICE OF
THE PRESIDENT

TENNESSEE STATE UNIVERSITY
3500 JOHN A. MERRITT BOULEVARD
NASHVILLE, TENNESSEE 37209-1561

RECEIVED

DEC 10 2008

FISCAL REVIEW

October 30, 2008

Chancellor Charles W. Manning
Tennessee Board of Regents
1415 Murfreesboro Road, Suite 350
Nashville, Tennessee 37217

Dear Chancellor Manning:

Transmitted herewith is a contract agreement between Tennessee State University and Fairborn Observatory, a non-for-profit 501(c) (3) organization directed by Louis J. Boyd. The purpose of this agreement is to continue the operation of Tennessee State University's state-of-the-art automated observatory located in the Patagonia Mountains of southern Arizona, which provides the primary research data for Tennessee State University's astronomers and students.

This agreement is the latest in a series of contracts with Fairborn Observatory covering the past 20 years. As a result of this collaboration between Tennessee State University and Fairborn Observatory, Tennessee State University has become the world's leader in astronomical research with robotic telescopes and has capabilities unmatched by any other institution in the world. Research results in several areas, particularly the search for planetary systems around other stars, has brought international recognition of Tennessee State University's research capabilities.

Therefore, I am requesting your approval of this contract. If you have questions, please contact Dr. Michael Busby at 615 963-1600.

Sincerely,

A handwritten signature in cursive script, reading "Melvin N. Johnson".

Melvin N. Johnson
President

PBS/MNJ/ys

Enclosure

pc: Ms. Cynthia B. Brooks, Vice President for Business and Finance
Mr. Frank Battle, Assistant Vice President for Procurement and Business Services

Approval:

A handwritten signature in cursive script, reading "Charles W. Manning".
Charles W. Manning, Chancellor

Date:

A handwritten signature in cursive script, reading "Dec 8, 2008".



**Center of Excellence in
Information Systems**

Telephone
(615) 277-1601

Fax
(615) 277-1614

November 15, 2008

Lisa Karen Atkins
Chief of Staff and University Counsel
Tennessee State University
Room 220, McWherter Administration Building
3500 John A. Merritt Boulevard
Nashville, TN 37209

Office of the Chief of Staff
and
University Counsel

NOV 18 2008

Tennessee State University

Dear Ms. Atkins:

In answer to the first question forwarded to us from Angela Gregory in your email of Nov. 6, 2008: We have buying this same sole-source service from Fairborn Observatory for the past two decades. Through this TSU/Fairborn partnership, we have developed a unique suite of automated telescopes that provides leading-edge research capability to TSU. As TSU's international reputation has grown along with increasing demand for our results, the observatory has grown in the number of telescopes operated by TSU. The previous sole-source contract between TSU and Fairborn Observatory (332.77-06.172) for this same service ran from 10/01/05 through 9/30/08. This previous contract was reviewed by the State of Tennessee Fiscal Review Committee on October 17, 2005, and they voted to recommend approval (see attached Memorandum).

In answer to question 2, we have never required a performance bond from Fairborn nor will we with this contract. This contract represents a research partnership between TSU and Fairborn Observatory, a non-profit Educational Corporation. As I understand it, a performance bond is not required nor would it be appropriate in this circumstance.

Thank you for your help with this important contract.

Sincerely,

Dr. Michael R. Busby
Director - TSU Center of Excellence
in Information Systems



Fairborn Contract

**GENERAL ASSEMBLY OF THE STATE OF TENNESSEE
FISCAL REVIEW COMMITTEE**

320 Sixth Avenue, North - 8th Floor
NASHVILLE, TENNESSEE 37243-0057
615-741-2564

Rep. Charles Curtiss, Chairman
Representatives

Harry Brooks
Curt Cobb
Bill Dunn
Dennis Ferguson
Craig Fitzhugh, *ex officio*
Speaker Jimmy Naifeh, *ex officio*

Mary Pruitt
Donna Rowland
David Shepard
Curry Todd

Sen. Don McLeary, Vice-Chairman
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Mae Beavers
Jim Bryson
Steve Cohen
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Lt. Governor John S. Wilder, *ex officio*

David Fowler
Steve Southerland

M E M O R A N D U M

TO: The Honorable Dave Goetz, Commissioner
Department of Finance and Administration

FROM: Charles Curtiss, Chairman
Don McLeary, Vice-Chairman

DATE: October 17, 2005

SUBJECT: Contract Comments
(Contract Services Subcommittee Meeting 10/12/05)

RFS# 332.77-06.172

Department: Tennessee State University

Contractor: Fairborn Observatory

Summary: This vendor will be responsible for providing maintenance services to house, operate, maintain and repair robotic telescopes and associated instrumentation.

Fairborn Observatory has provided these services to TSU for the past fifteen years.

This is a three-year contract beginning October 1, 2005 through September 30, 2008 with a maximum liability of \$585,000.

Original maximum liability: \$585,000

After review, the Fiscal Review Committee voted to recommend approval of the contract.

cc: Dr. Charles Manning, Chancellor, University of Tennessee
Elizabeth Holton McClaran, Administrative Assistant, TBR
Robert Barlow, Director, Office of Contracts Review

Supplemental Documentation Required for Fiscal Review Committee

*Contact Name:	Michael Busby		*Contact Phone:	615-277-1600	
*Contract Number:	332.77-09.272		*RFS Number:	N/A	
*Original Contract Begin Date:	1/1/09		*Current End Date:	12/31/2013	
Current Request Amendment Number: <i>(if applicable)</i>			N/A		
Proposed Amendment Effective Date: <i>(if applicable)</i>			N/A		
*Department Submitting:			Research & Sponsored Programs		
*Division:			Center of Excellence in Information		
*Date Submitted:					
*Submitted Within Sixty (60) days:					
<i>If not, explain:</i>					
*Contract Vendor Name:			FairBorn Observatory		
*Current Maximum Liability:			1,000,000		
*Current Contract Allocation by Fiscal Year: <i>(as Shown on Most Current Fully Executed Contract Summary Sheet)</i>					
FY: 2009	FY: 2010	FY: 2011	FY: 2012	FY: 2013	FY
\$ 200,000	\$ 200,000	\$ 200,000	\$ 200,000	\$ 200,000	\$
*Current Total Expenditures by Fiscal Year of Contract: <i>(attach backup documentation from STARS or FDAS report)</i>					
FY: 2009	FY: 2010	FY: 2011	FY: 2012	FY: 2013	FY
\$ 0.00	\$ N/A	\$ N/A	\$ N/A	\$ N/A	\$
IF Contract Allocation has been greater than Contract Expenditures, please give the reasons and explain where surplus funds were spent:			N/A		
IF surplus funds have been carried forward, please give the reasons and provide the authority for the carry forward provision:			N/A		
IF Contract Expenditures exceeded Contract Allocation, please give the reasons and explain how funding was acquired to pay the overage:			N/A		
*Contract Funding Source/Amount:	State:	\$700,000	Federal:	\$300,000	
Interdepartmental:			Other:		
If "other" please define:					

Supplemental Documentation Required for
Fiscal Review Committee

Dates of All Previous Amendments or Revisions: <i>(if applicable)</i>	Brief Description of Actions in Previous Amendments or Revisions: <i>(if applicable)</i>
N/A	
Method of Original Award: <i>(if applicable)</i>	N/A

REQUEST: NON-COMPETITIVE CONTRACT

APPROVED

RECEIVED

DEC 10 2008



FISCAL REVIEW

Commissioner of Finance & Administration

Date:

Each of the request items below indicates specific information that must be individually detailed or addressed as required.
A request can not be considered if information provided is incomplete, non-responsive, or does not clearly address each of the requirements individually as required.

1) RFS #	N/A	
2) State Agency Name :	TENNESSEE STATE UNIVERSITY	
3) Service Caption :	TELESCOPE OPERATION FEES	
4) Proposed Contractor :	FAIRBORN OBSERVATORY	
5) Contract Start Date : (attached explanation required if date is < 60 days after F&A receipt)	JANUARY 1, 2009	
6) Contract End Date IF <u>all</u> Options to Extend the Contract are Exercised :	DECEMBER 31, 2013	
7) Total Maximum Cost IF <u>all</u> Options to Extend the Contract are Exercised :	\$1,000,000.00	
8) Approval Criteria : (select one)	<input type="checkbox"/> use of Non-Competitive Negotiation is in the best interest of the state <input checked="" type="checkbox"/> only one uniquely qualified service provider able to provide the service	
9) Description of Service to be Acquired :	Operate and maintain Tennessee State University's automated telescopes in Patagonia, Arizona.	
10) Explanation of the Need for or Requirement Placed on the Procuring Agency to Acquire the Service :	These telescopes provide the primary research data for Tennessee State University's astronomers and students.	
11) Explanation of Whether the Procuring Agency Bought the Service in the Past, & if so, What Procurement Method It Used :	Tennessee State University has purchased this service sole source from Fairborn Observatory for the past twenty (20) years.	
12) Name & Address of the Proposed Contractor's Principal Owner(s) : (<u>not</u> required if proposed contractor is a state education institution)	Fairborn Observatory, 1327 Duquesne Road, Patagonia, Arizona 85624	
13) Evidence of the Proposed Contractor's Experience and Length of Experience Providing the Service :	Fairborn Observatory has provided this service to Tennessee State University for the past twenty (20) years making Tennessee State University the world's leader in automated astronomy.	

14) Documentation of Office for Information Resources Endorsement : (required <u>only</u> if the subject service involves information technology)		
select one:	<input type="checkbox"/> Documentation Not Applicable to this Request	<input checked="" type="checkbox"/> Documentation Attached to this Request
15) Documentation of Department of Personnel Endorsement : (required <u>only</u> if the subject service involves training for state employees)		
select one:	<input checked="" type="checkbox"/> Documentation Not Applicable to this Request	<input type="checkbox"/> Documentation Attached to this Request
16) Documentation of State Architect Endorsement : (required only if the subject service involves construction or real property related services)		
select one:	<input checked="" type="checkbox"/> Documentation Not Applicable to this Request	<input type="checkbox"/> Documentation Attached to this Request
17) Description of Procuring Agency Efforts to Identify Reasonable, Competitive, Procurement Alternatives :		
No transition or disruption of services to research effort.		
18) Justification of Why the State Should Use Non-Competitive Negotiation Rather Than a Competitive Process : (Being the "only known" or "best" service provider to perform the service as desired will not be deemed adequate justification.)		
There is no other group that has the immediate experience and capability to provide the continuity of service needed. The Tennessee State University and Fairborn Observatory collaboration has resulted in Tennessee State University's astronomers producing the best stellar brightness data in the world. No other group has this capability.		
REQUESTING AGENCY HEAD SIGNATURE & DATE : (must be signed & dated by the <u>ACTUAL</u> procuring agency head as detailed on the Signature Certification on file with OCR— signature by an authorized signatory will be accepted only in documented exigent circumstances)		
		
Agency Head Signature		Date

CONTRACT SUMMARY SHEET

021406

RFS #	Contract #
	517956
State Agency	State Agency Division
TENNESSEE STATE UNIVERSITY	TENNESSEE BOARD OF REGENTS
Contractor Name	Contractor ID # (FEIN or SSN)
FAIRBORN OBSERVATORY	<input type="checkbox"/> C- or <input type="checkbox"/> V- FEIN: 31-1042912

Service Description			
Operate and maintaing Tennessee State Univeristy's automated telescopes located in Patagonia, Arizona.			
Contract BEGIN Date	Contract END Date	Subrecipient or Vendor?	CFDA #
1-Jan-09	31-Dec-13	Fairborn Observatory	

Mark Each TRUE Statement					
<input type="checkbox"/> Contractor is on STARS			<input type="checkbox"/> Contractor's Form W-9 is on file in Accounts		
Allotment Code	Cost Center	Object Code	Fund	Funding Grant Code	Funding Subgrant Code
FY	State	Federal	Interdepartmental	Other	TOTAL Contract Amount
2009	\$200,000				\$ 200,000.00
2010	\$200,000				\$ 200,000.00
2011	\$200,000				\$ 200,000.00
2012	\$200,000				\$ 200,000.00
2013	\$200,000				\$ 200,000.00
					\$ -
TOTAL:	\$ 1,000,000.00	\$ -	\$ -	\$ -	\$ 1,000,000.00

— COMPLETE FOR AMENDMENTS ONLY —			State Agency Fiscal Contact & Telephone #
FY	Base Contract & Prior Amendments	THIS Amendment ONLY	Cynthia B. Brooks, Vice President for Business and Finance, 615/963-7410
			State Agency Budget Officer Approval
			<i>C Brooks</i> 10/8/08
			Funding Certification (certification, required by T.C.A., § 9-4-5113, that there is a balance in the appropriation from which the obligated expenditure is required to be paid that is not otherwise encumbered to pay obligations previously incurred)
TOTAL:	\$ -	\$ -	
End Date			

Contractor Ownership (complete only for base contracts with contract # prefix: FA or GR)					
<input type="checkbox"/> African American	<input type="checkbox"/> Person w/ Disability	<input type="checkbox"/> Hispanic	<input type="checkbox"/> Small Business	<input type="checkbox"/> NOT disadvantaged	
<input type="checkbox"/> Asian	<input type="checkbox"/> Female	<input type="checkbox"/> Native American	<input type="checkbox"/> OTHER minority/disadvantaged—		
Contractor Selection Method (complete for ALL base contracts— N/A to amendments or delegated authorities)					
<input type="checkbox"/> RFP	<input type="checkbox"/> Competitive Negotiation	<input type="checkbox"/> Alternative Competitive Method			
<input type="checkbox"/> Non-Competitive Negotiation	<input type="checkbox"/> Negotiation w/ Government(eg,ID,GG,GU)	<input type="checkbox"/> Other			

Procurement Process Summary (complete for Alternative Method, Competitive Negotiation, Non-Competitive Negotiation, OR Other)

See Non-Competitive Contract Form

Tennessee State University**JUSTIFICATION FOR NON-COMPETITIVE
PURCHASES AND CONTRACTS****1. Description of service to be acquired.**

To house, operate, maintain, repair, and upgrade our thirteen 0.40 meter to 2.0 meter robotic telescopes and associated instrumentation used to conduct state-of-the-art astronomical observations at a prime, secure, remote observing location in the desert southwest.

2. Explanation of the need for or requirement placed on the procuring agency to acquire the service.

These telescopes provide the primary scientific data required by the astrophysics group at the Tennessee State University Center of Excellence in Information Systems. The data are used by TSU researchers, faculty, and students for many projects including the study of brightness changes in Sun-like stars with implications for global climate change, the search for planets around other stars, and the study of variability in a variety of stars.

3. Name and address of the proposed contractor's principal owners(s).

The contractor is Fairborn Observatory, a non-profit Educational Corporation headed by Louis J. Boyd and located at 1327 Duquesne Road, Patagonia, Arizona 85624. Mailing address is HC2 Box 256, Patagonia, Arizona 85624.

4. Evidence that the proposed contractor has experience in providing the same or similar service and evidence of the length of time the contractor has provided the same or similar service.

Fairborn Observatory has been providing this service to TSU for 20 years. In that time, the number of telescopes operated by TSU astronomers has grown from one to thirteen; most of the new telescopes and instruments were designed and built by Fairborn personnel. The telescopes operate every clear night and provide the most precise data ever obtained, in quantities never before achievable, and at a tiny fraction of the cost of previous manual observing. As a result of the support from Fairborn Observatory, TSU has become the world's leader in astronomical research with robotic telescopes and has achieved capabilities unmatched by any other institution in the world.

5. Explanation of whether the service was ever bought by the procuring institution in the past, and if so, what method was used to acquire it and who was the contractor.

As explained in item 4, Fairborn Observatory has been providing this service to TSU for 20 years. Prior to the TSU/Fairborn partnership, such capability to make automated astronomical observations did not exist anywhere but has been DEVELOPED through this collaboration. Today, there remains no other organization that can provide this leading-edge capability to TSU.

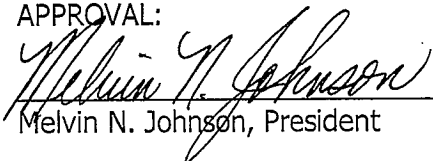
6. Description of procuring institution's efforts to use existing institutional employees and resources or, in the alternative, to identify reasonable, competitive procurement alternatives (rather than to use non-competitive negotiation).

The TSU/Fairborn collaboration has developed a unique astronomical research facility with unique research capabilities. No other institution or group has similar capabilities. Ours is a unique, highly-focused, research enterprise that is too complex and too specialized to commercialize. Several companies have tried and failed over the past two decades. TSU did contract with one such company in the mid 1990's to produce an automated telescope for us, but the company was unable to do so, and TSU was forced to cancel the contract. In addition, TSU has no institutional employees or resources in the southwest desert of Arizona needed to provide this service where these telescopes must be located to take advantage of the clear, dark skies.

7. Justification of why the state institution should acquire the service through non-competitive negotiation.

The TSU robotic telescopes are unique, state-of-the-art instruments designed and built by Fairborn Observatory. Such instruments are not available commercially from any other source in the world, nor do instruments with similar capability exist anywhere but Fairborn. Only Fairborn Observatory personnel, who developed these telescopes in collaboration with TSU, have the capability to keep these instruments operating on the cutting edge required by our research.

APPROVAL:



Melvin N. Johnson, President

10-29-08

Date

APPROVAL:

Charles W. Manning, Chancellor

Date

REVIEW BY FISCAL REVIEW COMMITTEE:

Chairman

Date

**CONTRACT
BETWEEN
TENNESSEE STATE UNIVERSITY
AND
FAIRBORN OBSERVATORY**

This Contract, by and between **Tennessee State University**, hereinafter referred to as the "Institution" and **Fairborn Observatory**, hereinafter referred to as the "Contractor," is for **the provision of operations and maintenance support for Tennessee State University's automated telescopes in southern Arizona**, as further defined in the "SCOPE OF SERVICES."

The Contractor is a **nonprofit Corporation**. The Contractor's address is:

**Fairborn Observatory
1327 Duquesne Road
Patagonia, AZ 85624**

The Contractor's place of incorporation or organization is the **State of Arizona**.

A. SCOPE OF SERVICES:

- A.1. Fairborn Observatory will continue to oversee the operation of Tennessee State University's automated astronomical observatory in the mountains of southern Arizona. This unique and powerful research facility has been developed over the past 20 years through the collaboration of Tennessee State University and Fairborn Observatory. It consists of numerous automated telescopes that provide the most precise stellar measurements available anywhere. Fairborn will oversee the nightly operation, data collection, data transmission, and proprietary maintenance of the optical, mechanical, electrical, and computer systems of the Tennessee State University telescopes at Fairborn Observatory.

B. CONTRACT TERM:

- B.1. Contract Term. This Contract shall be effective for the period commencing on **January 1, 2009** and ending on **December 31, 2009**. The Institution shall have no obligation for services rendered by the Contractor which are not performed within the specified period.
- B.2. Term Extension. The Institution reserves the right to extend this Contract for an additional period or periods of time representing increments of no more than one year and a total contract term of no more than **five (5)** years, provided that the Institution notifies the Contractor in writing of its intention to do so at least **thirty (30)** days prior to the Contract expiration date. An extension of the term of this Contract will be affected through an amendment to the Contract. If the extension of the Contract necessitates additional funding beyond that which was included in the original Contract, the increase in the Institution's maximum liability will also be affected through an amendment to the Contract and shall be based upon rates provided for in the original Contract.

C. PAYMENT TERMS AND CONDITIONS:

- C.1. Maximum Liability. In no event shall the maximum liability of the Institution under this Contract exceed **One Million Dollars (\$1,000,000.00)**. The Service Rates in Section C.3 include, but are not limited to, all applicable taxes, fees, overheads, and all other direct

and indirect costs incurred or to be incurred by the Contractor. The maximum liability represents available funds for payment to the Contractor and does not guarantee payment of any such funds to the Contractor under this Contract unless the Institution requests work and the Contractor performs the work.

C.2. Compensation Firm. The Service Rates and the Maximum Liability of the Institution under this Contract are firm for the duration of the Contract and are not subject to escalation for any reason unless this Contract is amended.

C.3. Payment Methodology. The Contractor shall be compensated based on the Service Rates given in **Attachments I, II, III, IV, and V** for units of service authorized by the Institution in a total amount not to exceed the Contract Maximum Liability established in Section C.1.

C.4. Travel Compensation.

The Contractor shall not be compensated or reimbursed for travel, meals, or lodging.

C.5. Payment of Invoice. The payment of an invoice by the Institution shall not prejudice the Institution's right to object to or question any invoice or matter in relation thereto. Such payment by the Institution shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.

C.6. Invoice Reductions. The Contractor's invoice shall be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the Institution, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute proper remuneration for compensable services.

C.7. Deductions. The Institution reserves the right to deduct from amounts which are or shall become due and payable to the Contractor under this or any Contract between the Contractor and the Institution any amounts which are or shall become due and payable to the Institution by the Contractor.

C.8. Retention of Final Payment. An amount of **Twenty Thousand Dollars (\$20,000), representing ten percent (10%)** of the maximum total compensation payable under this Contract, shall be withheld by the Institution until **thirty (30)** days after final completion of the services to be performed by the Contractor under this Contract.

D. TERMS AND CONDITIONS:

D.1. Required Approvals. The Institution is not bound by this Contract until it is approved by the appropriate officials in accordance with applicable Tennessee laws and regulations as shown on the signature page of this Contract.

D.2. Modification and Amendment. This Contract may be modified only by a written amendment executed by all parties hereto and approved by the appropriate officials.

D.3. Ethnicity. This Contract shall not be executed until the Contractor has completed the Minority/Ethnicity Form.

D.4. Termination for Convenience. The Institution may terminate this Contract without cause for any reason. Termination under this Section D. 4 shall not be deemed a Breach of Contract by the Institution. The Institution shall give the Contractor at least **ten (10)**

days written notice before the effective termination date. The Contractor shall be entitled to receive compensation for satisfactory, authorized service completed as of the termination date, but in no event shall the Institution be liable to the Contractor for compensation for any service which has not been rendered. Upon such termination, the Contractor shall have no right to any actual general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

- D.5. Termination for Cause. If the Contractor fails to perform its obligations under this Contract in a timely or proper manner, or if the Contractor violates any term of this Contract, the Institution shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services; provided, however, Institution shall have the option to give Contractor written notice and a specified period of time in which to cure. Notwithstanding the above, the Contractor shall not be relieved of liability to the Institution for damages sustained by virtue of any breach of this Contract by the Contractor.
- D.6. Subcontracting. The Contractor shall not assign this Contract or enter into a subcontract for any of the services performed under this Contract without obtaining the prior written approval of the Institution. If such subcontracts are approved by the Institution, they shall contain, at a minimum, sections of this Contract pertaining to "Conflicts of Interest" and "Nondiscrimination". Notwithstanding any use of approved subcontractors, the Contractor shall be the prime contractor and shall be responsible for all work performed.
- D.7. Conflicts of Interest. The Contractor warrants that no part of the total Contract amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.
- D.8. Nondiscrimination. The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of disability, age, race, color, religion, sex, veteran status, national origin, or any other classification protected by Federal, or State constitutional or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- D.9. Records. The Contractor shall maintain documentation for all charges against the Institution under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this Contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the Institution, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.
- D.10. Monitoring. The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the Institution, the Comptroller of the Treasury, or their duly appointed representatives.
- D.11. Progress Reports. The Contractor shall submit brief, periodic, progress reports to the Institution as requested. Progress reports shall consist of the data taken each night by

each of Tennessee State University's automated telescopes, along with all weather and site log files. The Contractor shall arrange for the transmission of these data via the Internet to Tennessee State University on a daily basis.

D.12. Strict Performance. Failure by any party to this Contract to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any such term, covenant, condition, or provision. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the parties hereto.

D.13. Independent Contractor. The parties hereto, in the performance of this Contract, shall not act as employees, partners, joint venturers, or associates of one another. It is expressly acknowledged by the parties hereto that the parties are independent contracting entities and that nothing in this Contract shall be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever.

The Contractor, being an independent contractor and not an employee of the Institution, agrees to carry adequate public liability and other appropriate forms of insurance on the Contractor's employees, and to pay all applicable taxes incident to this Contract.

D.14. Institution Liability. The Institution shall have no liability except as specifically provided in this Contract.

D.15. Force Majeure. The obligations of the parties to this Contract are subject to prevention by causes beyond the parties' control that could not be avoided by the exercise of due care including, but not limited to, acts of God, riots, wars, epidemics or any other similar cause.

D.16. State and Federal Compliance. The Contractor shall comply with all applicable State and Federal laws and regulations, including Institution policies and guidelines in the performance of this Contract.

D.17. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Contractor agrees that it will be subject to the exclusive jurisdiction of the Tennessee Claims Commission in actions that may arise under this Contract. The Contractor acknowledges and agrees that any rights or claims against the Institution or its employees hereunder, and any remedies arising therefrom, shall be subject to and limited to those rights and remedies, if any, available under ***Tennessee Code Annotated***, Sections 9-8-101 through 9-8-407.

D.18. Severability. If any terms or conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions hereof shall not be affected thereby and shall remain in full force and effect. To this end, the terms and conditions of this Contract are declared severable.

D.19. Headings. Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.

E. ADDITIONAL TERMS AND CONDITIONS:

E.1. Communications and Contacts.

The Institution:

Dr. Michael R. Busby, Director, Center of Excellence in Information Systems
Tennessee State University
3500 John A. Merritt Blvd., Box 9501
Nashville, TN 37209
615-277-1600
Fax: 615-277-1614
email: busby@coe.tsuniv.edu

The Contractor:

Louis J. Boyd, Director, Fairborn Observatory
1327 Duquesne Road
Patagonia, AZ 85624
520-394-9002
email: boyd@apt0.sao.arizona.edu

All instructions, notices, consents, demands, or other communications shall be sent in a manner that verifies proof of delivery. Any communication by facsimile transmission shall also be sent by United States mail on the same date as the facsimile transmission. All communications which relate to any changes to the Contract shall not be considered effective until agreed to, in writing, by both parties.

E.2. Subject to Funds Availability. The Contract is subject to the appropriation and availability of State and/or Federal funds. In the event that the funds are not appropriated or are otherwise unavailable, the Institution reserves the right to terminate the Contract upon written notice to the Contractor. Termination under this Section E.2 shall not be deemed a breach of Contract by the Institution. Upon receipt of the written notice, the Contractor shall cease all work associated with the Contract. Should such an event occur, the Contractor shall be entitled to compensation for all satisfactory and authorized services completed as of the termination date. Upon such termination, the Contractor shall have no right to recover from the Institution any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

E.3. Breach. A party shall be deemed to have breached the Contract if any of the following occurs (However, this list is not exclusive.):

- failure to perform in accordance with any term or provision of the Contract;
- partial performance of any term or provision of the Contract;
- any act prohibited or restricted by the Contract, or
- violation of any warranty.

For purposes of this Contract, these items shall hereinafter be referred to as a "Breach."

a. Contractor Breach— Institution shall notify Contractor in writing of a Breach.

- (1) In event of a Breach by Contractor, the Institution shall have available the remedy of actual damages and any other remedy available at law or equity.

(2) Liquidated Damages— **N/A**

- (3) Partial Default— In the event of a Breach, the Institution may declare a Partial Default. In which case, the Institution shall provide the Contractor written notice of: (1) the date which Contractor shall terminate providing the service associated with the Breach; and (2) the date the Institution will begin to provide the service associated with the Breach. Notwithstanding the foregoing, the Institution may revise the time periods contained in the notice written to the Contractor.

In the event the Institution declares a Partial Default, the Institution may withhold, together with any other damages associated with the Breach, from the amounts due the Contractor the greater of: (1) amounts which would be paid the Contractor to provide the defaulted service; or (2) the cost to the Institution of providing the defaulted service, whether said service is provided by the Institution or a third party. To determine the amount the Contractor is being paid for any particular service, the Institution shall be entitled to receive within five (5) days of any request, pertinent material from Contractor. The Institution shall make the final and binding determination of the amount.

The Institution may assess Liquidated Damages against the Contractor for any failure to perform. Upon Partial Default, the Contractor shall have no right to recover from the Institution any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount. Contractor agrees to cooperate fully with the Institution in the event a Partial Default is declared.

- b. Institution Breach— In the event of a Breach of contract by the Institution, the Contractor shall notify the Institution in writing within 30 days of any Breach of contract by the Institution. The notice shall contain a description of the Breach. In the event of Breach by the Institution, the Contractor may avail itself of any remedy available in the Claims Commission; provided, however, failure by the Contractor to give the Institution written notice and opportunity to cure as described herein operates as a waiver of the Institution's Breach. Failure by the Contractor to file a claim before the Claims Commission within one (1) year of the written notice of Breach shall operate as a waiver of the claim in its entirety. It is agreed by the parties this provision establishes a contractual period of limitations for any claim brought by the Contractor.

- E.4. Copyrights and Patents / Institution Ownership of Work Products. Contractor grants Institution a world-wide, perpetual, non-exclusive, irrevocable, fully paid up license to use any proprietary software products delivered under this Contract. The Institution shall have royalty-free and unlimited rights to use, disclose, reproduce, or publish, for any purpose whatsoever, as well as share in any financial benefits derived from the commercial exploitation of all work products created, designed, developed, or derived from the services provided under this Contract. The Institution shall have the right to copy, distribute, modify and use any training materials delivered under this Contract for internal purposes only.

The Contractor agrees to indemnify and hold harmless the Institution as well as its officers, agents, and employees from and against any and all claims or suits which may be brought against the Institution for infringement of any third party's intellectual

property rights, including but not limited to, any alleged patent or copyright violations. The Institution shall give the Contractor written notice of any such claim or suit and full right and opportunity to conduct the Contractor's own defense thereof. In any such action brought against the Institution, the Contractor shall take all reasonable steps to secure a license for Institution to continue to use the alleged infringing product or, in the alternative, shall find or develop a reasonable, non-infringing alternative to satisfy the requirements of this Contract.

The Contractor further agrees that it shall be liable for the reasonable fees of attorneys for the Institution in the event such service is necessitated to enforce the obligations of the Contractor to the Institution.

E.5. Performance Bond. The Institution reserves the right to require a performance bond to give assurance of performance by posting a performance bond executed by a surety company authorized to do business in the State of Tennessee in an amount determined by the Institution.

E.6. Competitive Procurements. If this Contract provides for reimbursement of the cost of goods, materials, supplies, equipment, or services, such procurements shall be made on a competitive basis, when practical.

E.7. Inventory/Equipment Control.

No equipment shall be purchased under this Contract.

E.8. Institution Furnished Property. The Contractor shall be responsible for the correct use, maintenance, and protection of all articles of nonexpendable, tangible, personal property furnished by the Institution for the Contractor's temporary use under this Contract. Upon termination of this Contract, all property furnished shall be returned to the Institution in good order and condition as when received, reasonable use and wear thereof excepted. Should the property be destroyed, lost, or stolen, the Contractor shall be responsible to the Institution for the residual value of the property at the time of loss.

E.9. Contract Documents. Included in this Contract by reference are the following documents:

a. This Contract document and its attachments

In the event of a discrepancy or ambiguity regarding the interpretation of this Contract, these documents shall govern in order of precedence as listed above.

E.10. Prohibited Advertising. The Contractor shall not refer to this Contract or the Contractor's relationship with the Institution hereunder in commercial advertising in such a manner as to state or imply that the Contractor or the Contractor's services are endorsed.

E.11. Hold Harmless. The Contractor agrees to indemnify and hold harmless the Institution as well as its officers, agents, and employees from and against any and all claims, liabilities, losses, and causes of action which may arise, accrue, or result to any person, firm, corporation, or other entity which may be injured or damaged as a result of acts, omissions, or negligence on the part of the Contractor, its employees, or any person acting for or on its or their behalf relating to this Contract. The Contractor further agrees it shall be liable for the reasonable cost of attorneys for the Institution in the event such

service is necessitated to enforce the terms of this Contract or otherwise enforce the obligations of the Contractor to the Institution.

In the event of any such suit or claim, the Contractor shall give the Institution immediate notice thereof and shall provide all assistance required by the Institution in the Institution's defense. The Institution shall give the Contractor written notice of any such claim or suit, and the Contractor shall have full right and obligation to conduct the Contractor's own defense thereof. Nothing contained herein shall be deemed to accord to the Contractor, through its attorney(s), the right to represent the Institution in any legal matter, such rights being governed by *Tennessee Code Annotated*, Section 8-6-106.

E.12. Debarment and Suspension. The Contractor certifies, to the best of its knowledge and belief, that it and its principals:

- a. are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal or state department or agency;
- b. have not within a three (3) year period preceding this Contract been convicted of, or had a civil judgment rendered against them from commission of fraud, or a criminal offense in connection with obtaining attempting to obtain, or performing a public (Federal, State, or Local) transaction or grant under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;
- c. are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State, or Local) with commission of any of the offenses listed in section b. of this certification; and
- d. have not within a three (3) year period preceding this Contract had one or more public transactions (Federal, State, or Local) terminated for cause or default.

E.13. Prohibition on Hiring Illegal Immigrants. Tennessee Public Chapter No. 878 of 2006, TCA 12-4-124, requires that Contractor attest in writing that Contractor will not knowingly utilize the services of illegal immigrants in the performance of this Contract and will not knowingly utilize the services of any subcontractor, if permitted under this Contract, who will utilize the services of illegal immigrants in the performance of this Contract. The attestation shall be made on the form, Attestation re Personnel Used in Contract Performance ("the Attestation"), which is attached and hereby incorporated as **Attachment-VI.**

If Contractor is discovered to have breached the Attestation, the Commissioner of Finance and Administration shall declare that the Contractor shall be prohibited from contracting or submitting a bid to any Tennessee Board of Regents institution or any other state entity for a period of one (1) year from the date of discovery of the breach. Contractor may appeal the one (1) year by utilizing an appeals process in the Rules of Finance and Administration, Chapter 0620.

IN WITNESS WHEREOF:

FAIRBORN OBSERVATORY:

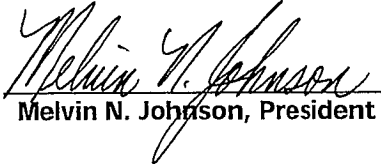


Louis J. Boyd, Director

Sept 25, 2008

Date

TENNESSEE STATE UNIVERSITY:



Melvin N. Johnson, President

10-29-08

Date

APPROVED:

TENNESSEE BOARD OF REGENTS:

Charles W. Manning, Chancellor

Date

ATTACHMENT I **BUDGET** **YEAR 1**

Jan 1, 2009 – December 31, 2009

Annual Operating Cost for Automatic Telescope

<u>Telescope</u>	<u>Type</u>	<u>Allocation</u>
T3	0.40m APT	15,000
T4	0.75m APT	15,000
T8	0.80m APT	15,000
T9	0.61m AIT	20,000
T10	0.80m APT	15,000
T11	0.80m APT	15,000
T12	0.80m APT	15,000
T13	2.0m AST	35,000
T15	0.51m APT	15,000
T16	0.51m AIT	15,000
T17	0.80m APT	15,000
T18	0.80m APT	5,000
T19	0.80m APT	<u>5,000</u>
		\$200,000

APT – Automatic Photometric Telescope: for making precise automated brightness measurements of stars

AIT – Automatic Imaging Telescope for making automated images of star fields

AST – Automated Spectroscopic Telescope for taking automated spectra of stars

ATTACHMENT II BUDGET YEAR 2

Jan 1, 2010 – December 31, 2010

Annual Operating Cost for Automatic Telescope

<u>Telescope</u>	<u>Type</u>	<u>Allocation</u>
T3	0.40m APT	15,000
T4	0.75m APT	15,000
T8	0.80m APT	15,000
T9	0.61m AIT	20,000
T10	0.80m APT	15,000
T11	0.80m APT	15,000
T12	0.80m APT	15,000
T13	2.0m AST	35,000
T15	0.51m APT	15,000
T16	0.51m AIT	15,000
T17	0.80m APT	15,000
T18	0.80m APT	5,000
T19	0.80m APT	<u>5,000</u>
		\$200,000

APT – Automatic Photometric Telescope: for making precise automated brightness measurements of stars

AIT – Automatic Imaging Telescope for making automated images of star fields

AST – Automated Spectroscopic Telescope for taking automated spectra of stars

ATTACHMENT III BUDGET YEAR 3

Jan 1, 2011 – December 31, 2011

Annual Operating Cost for Automatic Telescope

<u>Telescope</u>	<u>Type</u>	<u>Allocation</u>
T3	0.40m APT	15,000
T4	0.75m APT	15,000
T8	0.80m APT	15,000
T9	0.61m AIT	20,000
T10	0.80m APT	15,000
T11	0.80m APT	15,000
T12	0.80m APT	15,000
T13	2.0m AST	35,000
T15	0.51m APT	15,000
T16	0.51m AIT	15,000
T17	0.80m APT	15,000
T18	0.80m APT	5,000
T19	0.80m APT	<u>5,000</u>
		\$200,000

APT – Automatic Photometric Telescope: for making precise automated brightness measurements of stars

AIT – Automatic Imaging Telescope for making automated images of star fields

AST – Automated Spectroscopic Telescope for taking automated spectra of stars

ATTACHMENT IV BUDGET YEAR 4

Jan 1, 2012 – December 31, 2012

Annual Operating Cost for Automatic Telescope

<u>Telescope</u>	<u>Type</u>	<u>Allocation</u>
T3	0.40m APT	15,000
T4	0.75m APT	15,000
T8	0.80m APT	15,000
T9	0.61m AIT	20,000
T10	0.80m APT	15,000
T11	0.80m APT	15,000
T12	0.80m APT	15,000
T13	2.0m AST	35,000
T15	0.51m APT	15,000
T16	0.51m AIT	15,000
T17	0.80m APT	15,000
T18	0.80m APT	5,000
T19	0.80m APT	<u>5,000</u>
		\$200,000

APT – Automatic Photometric Telescope: for making precise automated brightness measurements of stars

AIT – Automatic Imaging Telescope for making automated images of star fields

AST – Automated Spectroscopic Telescope for taking automated spectra of stars

**ATTACHMENT V
BUDGET
YEAR 5**

Jan 1, 2013 – December 31, 2013

Annual Operating Cost for Automatic Telescope

<u>Telescope</u>	<u>Type</u>	<u>Allocation</u>
T3	0.40m APT	15,000
T4	0.75m APT	15,000
T8	0.80m APT	15,000
T9	0.61m AIT	20,000
T10	0.80m APT	15,000
T11	0.80m APT	15,000
T12	0.80m APT	15,000
T13	2.0m AST	35,000
T15	0.51m APT	15,000
T16	0.51m AIT	15,000
T17	0.80m APT	15,000
T18	0.80m APT	5,000
T19	0.80m APT	<u>5,000</u>
		\$200,000

APT – Automatic Photometric Telescope: for making precise automated brightness measurements of stars

AIT – Automatic Imaging Telescope for making automated images of star fields

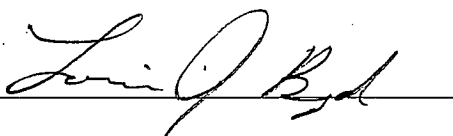
AST – Automated Spectroscopic Telescope for taking automated spectra of stars

ATTACHMENT VI

ATTESTATION RE: PERSONNEL USED IN CONTRACT PERFORMANCE

SUBJECT CONTRACT NUMBER:	
CONTRACT LEGAL ENTITY NAME:	Fairborn Observatory
FEDERAL EMPLOYER IDENTIFICATION NUMBER: (or Social Security Number)	31-1042912

The Contractor, identified above, does hereby attest, certify, warrant, and assure that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the performance of this Contract.

Signature:  Date: Sept 25, 2008

NOTICE: This attestation **MUST** be signed by an individual empowered to contractually bind the Contractor. If said individual is not the chief executive or president, this document shall attach evidence showing the individual's authority to contractually bind the Contractor.